

***United States Court of Appeals  
for the Second Circuit***



**AMICUS BRIEF**



74-1738

In the  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

**THE NATIONAL NUTRITIONAL FOODS ASSOCIATION, and  
SOLGAR, CO., INC.,**

*Plaintiffs-Appellants,*

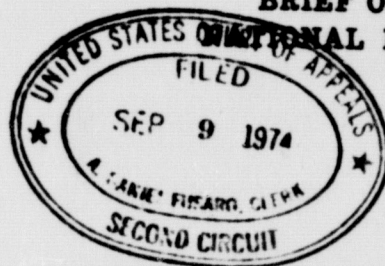
vs.

**CASPAR W. WEINBERGER, Secretary of Health Education and  
Welfare and ALEXANDER M. SCHMIDT, Commissioner of  
Food and Drugs,**

*Defendants-Appellees.*

On Appeal from the United States District Court  
for the Southern District of New York.

**BRIEF OF AMICUS CURIAE,  
NATIONAL HEALTH FEDERATION**



**KIRKPATRICK W. DILLING  
DENNIS M. GRONEK  
188 West Randolph Street  
Chicago, Illinois 60601**

*Attorneys for Plaintiffs-Appellants*

*Of Counsel*  
**DIANA J. DILLING**



## TABLE OF CONTENTS

	PAGE
Preliminary Statement .....	1
Issues Presented for Review .....	2
Statement of the Case .....	2
The Vitamins A and D Regulations .....	2
Argument .....	4
Vitamin A .....	4
Vitamin D .....	4
Vitamins A and D not Prescription Drugs .....	6
Increased Quantities of Food not Drugs .....	7
<i>National Nutritional Foods Association, et al.,</i> <i>v. FDA</i> .....	10
Conclusion .....	13

## AUTHORITIES CITED

### *Cases*

Bradley v. United States, 264 Fed. 79 (5 Cir., 1920) ....	9
National Nutritional Foods Association and Solgar Company, Inc., et al. v. Food and Drug Administra- tion, United States Department of Health, Educa- tion, and Welfare, et al., (— F.2d —) .....	10, 11, 12
National Petroleum Refiners Ass'n. v. FTC, 482 F.2d 672, 692 (C.A.D.C., 1973), cert. den. 42 U.S. Law Week 3483 (Feb. 26, 1974) (No. 73-806) .....	8
United States v. An article of drug . . . Hon. J., 344 F.2d 288 (6 Cir., 1965) .....	9
United States v. 45-2/3 packages . . . Shaving Medium, 46 F.Supp. 112 (S.D. N.Y., 1942) .....	9

*Statutes*

	PAGE
Federal Register Volume 38, No. 148 .....	3, 10
Section 201(g) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 321(g) .....	8, 10
Section 403(j) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 343(j) .....	5, 6
Section 503(b) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 353(b) .....	7, 12
Section 701(2) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(2) .....	8
21 Code of Federal Regulations, Part 125.3 .....	5

*Other Authorities*

Key Nutrients, Extension Service, U. S. Department of Agriculture, Publication PA 691-1971 .....	4
Nutrition—Background and Issues, 1971 White House Conference on Aging, U. S. Government Printing Office .....	4
Recommended Dietary Allowances Eighth Edition, 1974 National Academy of Science—National Re- search Council .....	4
Recommended Dietary Allowances Seventh Edition, 1968, National Academy of Science—National Re- search Council .....	4
S. Rep. No. 361, 74th Cong., 1st Sess. 4 (1935) .....	9
U.S. Department of Agriculture Yearbook—1959 .....	4

**In the**  
**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

---

**No. 74-1738**

---

---

---

**THE NATIONAL NUTRITIONAL FOODS ASSOCIATION, and  
SOLGAR, CO., INC.,**

*Plaintiffs-Appellants,*

**vs.**

**CASPAR W. WEINBERGER, Secretary of Health Education and  
Welfare and ALEXANDER M. SCHMIDT, Commissioner of  
Food and Drugs,**

*Defendants-Appellees.*

---

---

On Appeal from the United States District Court  
for the Southern District of New York.

---

**BRIEF OF AMICUS CURIAE,  
NATIONAL HEALTH FEDERATION**

---

**PRELIMINARY STATEMENT**

By special leave of the Court, The National Health Federation appears herein as *amicus curiae*, and herewith presents its brief in opposition to the Vitamins A and D regulations of the U. S. Food and Drug Administration which are on review herein, per an appeal from a decision of the U. S. District Court for the Southern District of New York, Honorable Marvin E. Frankel, District Judge Presiding.

## ISSUES PRESENTED FOR REVIEW

---

### I.

The regulations under consideration are arbitrary, capricious, and unreasonable.

### II.

FDA exceeded its legal authority in issuing the regulations under consideration.

## STATEMENT OF THE CASE

The National Health Federation is a California membership corporation, and is America's largest, noncommercial health consumer group. It is a nonprofit corporation founded in 1955, and membership is comprised of men and women in all walks of life, belonging to a variety of religious faiths and political persuasions, and engaged in nearly every profession and trade. Its members believe that health freedoms are inherently guaranteed to us as human beings, and our right to them as Americans is implied in the words, "life, liberty and the pursuit of happiness". The National Health Federation and its membership of 80,000 or more members oppose monopoly and compulsion in matters related to health and nutrition, where the safety and welfare of others are not concerned. In particular, the Federation and its membership believe in the "freedom of choice" now, and always, exercised by American citizens as to their diets, and oppose "diet dictation" of any type whatsoever from Washington, or elsewhere.

### The Vitamin A and D Regulations

On December 14, 1972, the Commissioner of Food and Drugs proposed regulations to change, and alter, so-called "foods for special dietary use", with more than 10,000

I.U. of Vitamin A per recommended daily intake, and those containing more than 400 I.U. of Vitamin D, to "prescription drugs".

On August 2, 1973, the Commissioner adopted these regulations (F.R. Volume 38 No. 148, pages 20, 723-20, 725), without hearing.

In the text accompanying the regulations, the Commissioner concludes that an over-consumption of Vitamin A and Vitamin D can result in toxicity.

*Nowhere, however, in the Commissioner's final order is there any finding as to what amounts of Vitamin A or Vitamin D are toxic, dangerous or unsafe.*

Is there something "magic" about designating 10,001 units of Vitamin A as a "prescription drug", subject only to dispensing by a licensed physician, or likewise creating a "prescription drug" of a food containing 401 units of Vitamin D? The Commissioner's final order was silent in this respect.

Amicus Curiae submits that the agency's actions herein were in excess of any authority granted by Congress, and this Honorable Court should overrule the decision of the lower Court, negating injury to Amicus Curiae's members, inherent in denial of their freedom of choice to purchase Vitamin A and D containing foods which they consider desirable and appropriate.

In view of the broad implications and extreme importance of the issues presented in this case, Amicus Curiae has submitted this brief on behalf of its members, constituting a broad spectrum of U. S. consumers, from all walks of life.

## ARGUMENT

---

### Vitamin A

*Vitamin A* is an essential nutritional factor for everyone, which promotes growth, helps eyes adjust to dim light, helps keep skin healthy, and helps keep the lining of the mouth, nose, throat and digestive tract healthy and resistant to infection. ("Key Nutrients", Extension Service, U. S. Department of Agriculture (Publication PA 691—1971); "Nutrition—Background and Issues", 1971 White House Conference on Aging (U. S. Govt. Printing Office); Recommended Dietary Allowances, Seventh Edition 1968, National Academy of Sciences—National Research Council; Recommended Dietary Allowances, Eighth Edition, 1974, National Academy of Sciences—National Research Council.)

As previously noted, under the regulations being considered herein, 10,001 units of Vitamin A would be rendered a "prescription drug", wholly unsafe for consumption by a consumer except under the direction of a doctor.

By way of comparison, 10,001 units of Vitamin A is about 16% less than that found in two carrots (12,000 units), less than one-half the Vitamin A in one-half cup of cooked spinach, and less than one-third the amount in two ounces of fried beef liver (30,330 units). (See U. S. Department of Agriculture Yearbook—1959, page 244, et seq.)

### Vitamin D

*Vitamin D* is likewise a nutrient vitally essential for everyone, which helps the body use calcium and phosphorus to build strong bones and teeth, which is important in growing children, and during pregnancy and lactation,

among other things. (See the aforesaid references as to this vitamin, also.)

Per the regulations under consideration herein, 401 units of Vitamin D is the purported "danger limit" beyond which medical prescription is deemed mandatory. However, such amount of Vitamin D has heretofore been designated by the U. S. Food and Drug Administration as the *minimum* (so-called "Minimum Daily Requirement") to be consumed by any person, below which amount one would risk danger of serious illness, even death. See 21 Code of Federal Regulations, Part 125.3 (copy thereof attached hereto as Appendix A.)

This circumstance in and of itself is unreasonable, arbitrary and capricious, preventing one from obtaining more than a bare *minimum* of this vital nutrient in a dietary food, except by leave and prescription of a Doctor.

For more than thirty years, products containing vitamins A and D have been considered "foods for special dietary uses" subject to Section 403(j) of the Act (21 U.S.C. 343(j)). (See Appendix "A" hereto.)

Section 403(j) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 343(j)) provides for adoption of regulations so that the label of a "food for special dietary uses" bears such information as is "necessary in order to *fully inform purchasers* as to its face value for such uses". (Emphasis added)

Regulations adopted under said statute must obviously be in furtherance of, consonant with, not repugnant thereto, and fully and properly carrying out the intent and purpose of the statute as adopted by the U. S. Congress in the first place.

Pursuant to the Section 403(j) of the Act, regulations governing vitamins A and D, and other nutrients, were duly enacted. These regulations provided for what should be included on labels of products containing vitamins A and D. Appended hereto, as "Appendix A", is the applicable portion of 21 Code of Federal Regulations which was so enacted. The provisions in question were issued under Section 403 of the Act, such Section including the aforesaid "special dietary foods" provisions. The Court will also note that no limitations upon quantity of any of the nutrients covered, including vitamins A and D, were specified therein. Nor were any amounts of vitamins A and D whatsoever designated "prescription drugs" by regulation. Accordingly, a properly labeled vitamin A or vitamin D product could, under such regulations, contain any amount of such vitamins, without violating the same.

The Commissioner's orders of August 2, 1973, purported to change these regulations, arbitrarily designating vitamin A products containing more than 10,000 units as "prescription drugs", and rendering a like designation for vitamin D products in excess of 400 units.

How could anyone contend that special dietary products for more than thirty years prior thereto subject to Section 403(j) of the Act suddenly became "prescription drugs" on August 2, 1973 for purposes of the Commissioner's "interpretive" regulations under review herein?

#### **Vitamins A and D Not "Prescription Drugs"**

Defendants contend that the Vitamin A and D regulations under consideration herein merely "interpret" the "prescription drug" provisions of the Federal Food, Drug, and Cosmetic Act.

The "prescription drug" provisions of the Act in question (Section 503(b); 21 U.S.C. 353(b)) merely provide that: "A drug intended for use by man which—because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug . . . shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist. . . ."

Therefore, to meet the criteria of this Section of the Act, vitamins A and D would necessarily be, first, "drugs", and, second, so "toxic" or "unsafe" as to require a prescription of a doctor to be permitted for consumption by a purchaser.

From what is hereinbefore set forth, it is obvious that the amounts of vitamins A and D rendered "prescription drugs" by the FDA Commissioner in his "interpretive" regulations are not either "unsafe" or "toxic", or otherwise meeting the criteria of the aforesaid "prescription drug" provisions of the Act. And, as noted, nowhere in these regulations did the FDA Commissioner make any finding whatsoever as to what amount of vitamin A or D is indeed "toxic" or "unsafe". The Commissioner's action in this respect was purely arbitrary.

### **Increased Quantities of Foods Not "Drugs"**

As previously noted, the regulations under consideration herein arbitrarily "convert" vitamins A and D into "drugs", solely by virtue of the quantity of such nutrients which may be present in a product. Thus, 5,000 units of Vitamin A is a "dietary food", while 5,001 units becomes

a "drug", whereas 10,001 units becomes a "prescription drug". Likewise, 400 units of Vitamin D is a "food", while 401 units becomes a "prescription drug".

In decreeing these nutrients to be "drugs", solely because of what quantity is present in a product, the FDA Commissioner grossly exceeded his legal authority pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act.

The alleged authority for promulgation of the regulations rests on Section 701(a) of the Act (21 U.S.C. 371(a)), which merely authorizes the FDA to promulgate regulations "for the efficient enforcement" of the Food and Drug Act. Regulations issued under such general rulemaking authority can have legal significance solely if within the scope of the statutory provisions purportedly implemented. *National Petroleum Refiners Ass'n. v. FTC*, 482 F.2d 672, 692 (C.A.D.C., 1973), cert. den. 42 U.S. Law Week 3483 (Feb. 26, 1974) (No. 73-806).

Section 201(g) of the Act (21 U.S.C. 321(g)) defines "drugs", in applicable part, as:

"... articles *intended for use* in the diagnosis, cure, mitigation, treatment, or prevention of disease in man . . ." (Section 201(g)(1)(B); 21 U.S.C. Section 321(g)(1)(B)). (Emphasis supplied)

Thus, a food may be deemed a "drug" only if it is intended for therapeutic use in disease conditions.

Said Section 201(g)(1)(B) thus provides that a substance is a "drug" if it is "*intended for use* in the diagnosis, cure, mitigation, treatment or prevention of disease in man. . . ." (Emphasis added). The key criterion of this statute is *intent*. A product can be food under certain circumstances, or it can be a "drug", depending upon the in-

tention of the party marketing it. Hence, under a predecessor Act, it was held that, because of representations made for it, mineral water was a "drug". *Bradley v. United States*, 264 Fed. 79 (5 Cir., 1920). Only that mineral water was a "drug", however, and by no means did the decision declare all mineral water everywhere a "drug". Similarly, later court decisions held likewise, and based upon the intent of the distributor, that such substances as honey and shaving cream can be "drugs". *United States v. An article of drug . . . Honey*, 344 F. 2d 288 (6 Cir., 1965); *United States v. 45-2/3 packages . . . Shaving Medium*, 46 F. Supp. 112 (S.D. N.Y., 1942). Once again, the decisions were premised upon the *intent* of those distributing, and certainly not all honey and shaving creams were declared "drugs".

The legislative history of the aforesaid drug definition further establishes beyond question that the marketing intentions and representations of the seller or the distributor are controlling under the statute.

The Report of the Senate Commerce Committee on this provision stated in this regard:

"The use to which the product is to be put will determine the category into which it will fall. If it is to be used only as a food it will come within the definition of food and none other. If it contains nutritive ingredients but is sold for drug use only, as clearly shown by the label and advertising, it will come within the definition of drugs, but not that of food. If it is sold to be used both as a food and for the prevention or treatment of disease it would satisfy both definitions and be subject to the substantive requirements for both. *The manufacturer of the article, through his representation in connection with its role, can determine the use to which the article is to be put.*" S. Rep. No. 361, 74th Cong., 1st Sess. 4 (1935). (Emphasis Supplied.)

In the instance at hand, the FDA Commissioner ignored the clear and concise provisions of the aforesaid statute, arbitrarily determining that products containing Vitamins A or D automatically become "drugs" solely by virtue of the *quantity* of such nutrients present in a product, and without regard to the criterion of *intent* specified in the Act, this criterion being prerequisite to rendering a substance a "drug". FDA's attempt in the regulations at hand to define Vitamins A and D as "drugs" without regard to the question of intended use, and solely upon the basis of arbitrary levels of nutritional potency, is clearly inappropriate and invalid.

**National Nutritional Foods Association, et al., v. FDA**

On August 15, 1974, this Court rendered a decision in the matter of *National Nutritional Foods Association and Solgar Company, Inc., et al. v. Food and Drug Administration, United States Department of Health, Education, and Welfare, et al.*, (..... F.2d .....), opinion by Circuit Judge Friendly. Said cause involved the review of certain final orders of the FDA Commissioner, and published in the Federal Register dated August 2, 1973 (38 F.R. 20708-20718, and 20730-20740, respectively), which purported to establish final regulations concerning so-called foods for special dietary uses, and establish ostensible definitions and standards of identity for such foods. The petitions to review were granted in part and denied in part, enforcement of the regulations was stayed, and the cause was remanded to FDA for further proceedings consistent with the opinion.

In such cause, as here, the provisions of the aforesaid Section 201(g)(1)(B) of the Act were at issue. The decision of the Court rendered invalid a provision of the regulations arbitrarily designating nutritional potencies exceeding a percentage of the U.S. "RDA" as "drugs".

The opinion states the following at page 5252:

"Section 201(g)(1)(B) makes the vendor's intent the crucial element in the definition of 'drug' here at issue. See also S. Rep. No. 361, *supra*, in Dunn at 240, and the cases consistently have read that language for its plain meaning. While we agree that a factfinder should be free to pierce all a manufacturer's subjective claims of intent and even his misleadingly 'nutritional' labels to find actual therapeutic intent on the basis of objective evidence in a proper case, such objective evidence would need to consist of something more than demonstrated uselessness as a food for most people. We therefore hold that Section 125.1(h) is invalid."

And (page 5252):

"As will emerge more fully in the next section of the opinion, dealing with the RDA's as a basis for the upper limits in the standards of identity, a significant number of persons have indisputable nutritional need for potencies exceeding the upper limits; in particular, and by no means exclusively, this includes the large number of women taking oral contraceptives. In light of this, it cannot be said even as an objective matter that a given bottle of pills, each containing more than the upper limit of one or more nutrients, is not being used for nutritional purposes.

"*A fortiori* it follows that the vendor of such a product can in good faith intend it for nontherapeutic use."

In a footnote accompanying the foregoing, the Court stated:

"It is to be noted, also, although this is of course not dispositive, that many common foods contain potencies per serving considerably above the upper limits. We are told, for example, that six ounces of fried beef liver contains 18 times the upper limit of Vitamin A and that a glass of orange juice contains 140% the upper limit of Vitamin C."

It is of interest that in said cause, FDA had claimed "res judicata", in effect, as to the issues aforesaid by virtue of the lower Court decisions rendered in this matter by Judge Frankel. Concerning this circumstance, a footnote to the Court's opinion states (page 5250):

"The FDA claims *inter alia* that the issue of statutory authority, *cf.* note 35 *infra*, has already been settled in its favor by the decisions cited in Part I, *supra*, upholding other regulations, 21 C.F.R. Sections 3.94 and 3.95, requiring that preparations of vitamins A and D in dosages exceeding 10,000 and 400 international units, respectively, shall be restricted to sale as prescription drugs. But the dominant consideration in both those cases was the determination that the FDA had properly provided by rule that these preparations could be dispensed only on prescription by a physician under Section 503(b)(1)(B), authorizing this in the case of a drug intended for use by man which

because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary for its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug.

21 U.S.C. Section 353(b)(1)(B). The decision that vitamins A and D in dosages above a given level were 'drugs' at all was reached in the first opinion with a degree of ease obviously dictated by Judge Frankel's view that they had properly been placed in the even more restrictive prescription category, and was reached in the second opinion without explicit treatment."

Amicus Curiae respectfully submits that the FDA Commissioner's orders decreeing arbitrary nutritional poten-

cies of vitamins A and D to be "drugs" and "prescription drugs" was not only capricious and unreasonable, but without legal authority pursuant to any applicable provision of the Federal Food, Drug, and Cosmetic Act.

### CONCLUSION

Amicus Curiae, National Health Federation prays that this Honorable Court shall reverse and set aside the decision of the lower Court under review herein, and for such other relief as to the Court may seem meet and proper.

Respectfully submitted,

KIRKPATRICK W. DILLING

DENNIS M. GRONEK

188 West Randolph Street

Chicago, Illinois 60601

*Attorneys for National Health  
Federation, Amicus Curiae*

DIANA J. DILLING

*Of Counsel*



## APPENDIX



## APPENDIX A

---

From 21 Code of Federal Regulations, Revised as of  
April 1, 1973

§ 125.3 *Label statements relating to vitamins.*

(a)(1) If a food purports to be or is represented for special dietary use by man by reason of its vitamin property in respect of:

Vitamin A or its precursors,

Vitamin B<sup>1</sup> (thiamine),

Vitamin C (ascorbic acid),

Vitamin D,

Riboflavin, or

Niacin or niacinamide,

the label (except as provided in this paragraph, with respect to cow's milk and evaporated milk, and unless the exemption under subparagraph (3) of this paragraph applies) shall bear a statement of the proportion of the minimum daily requirement for such vitamin supplied by such food when consumed in a specified quantity during a period of one day. If such purported or represented special dietary use is for persons within two or more age groups for which minimum daily requirements are set forth in paragraph (b), such statement shall include such proportion for each such group; but if such use is for persons irrespective of age groups, such statement may be limited to the proportion of the minimum daily requirement set forth in paragraph (b) of this section for an adult. The quantity specified as above required shall be the quantity customarily or usually consumed during a period of one day, or a quantity reasonably suitable for and practicable of consumption within such period. When

## App. 2

such proportion is a whole number and a fraction it may be expressed as the whole number and the fraction may be disregarded. The foregoing requirements of this paragraph shall not apply to cow's milk and evaporated milk which purport to be or are represented for special dietary use by reason of their content of vitamin D; but in the case of cow's milk in which vitamin D content has been increased by any means, and in the case of evaporated milk with increased vitamin D content as prescribed in the definition and standard of identity for evaporated milk; (§18.520 of this chapter), the label shall bear a statement of the number of U.S.P. units in a specified quantity of such milk or evaporated milk. In the case of cow's milk in which the vitamin D content is increased to less than 135 U.S.P. units to each quart, the label shall also bear a statement that additional vitamin D should be supplied from other sources.

(2) If a food purports to be or is represented for special dietary use by man by reason of its vitamin property in respect of any vitamin not listed in subparagraph (1) of this paragraph, the label shall bear a statement of the quantity of such vitamin in a specified quantity of such food. The quantity of food specified as required by this section, shall be the quantity customarily or usually consumed during a period of one day, or a quantity reasonably suitable for and practicable of consumption within such period. If the need in human nutrition for such vitamin has not been established the label shall also bear the statement "The need for ..... in human nutrition has not been established," the blank to be filled in with the name of such vitamin.

(3) If a food purports to be or is represented for special dietary use by man by reason of its vitamin property, and any such use is for treating any disease resulting

### App. 3

from a dietary deficiency of any vitamin, the label shall bear a statement of the quantity of such vitamin in a specified quantity of such food. If the represented special dietary use of such food is solely for treating any such disease, such food shall be exempt from the labeling requirements of subparagraphs (1) and (2) of this paragraph when otherwise applicable.

(4) Compliance with the provisions of subparagraphs (2) and (3) of this paragraph shall not be construed as relieving any food which purports to be or is represented for special dietary use by reason of its vitamin property from the application of section 403 (a) and 201 (n) of the act, as in the case where the need for such vitamin in human nutrition is not substantially supported by the opinion of experts qualified by scientific training and experience to determine such needs.

(b) For the purposes of the regulations in this section the following are minimum daily requirements:

(1) *For vitamin A, 1,500 U.S.P. units for an infant, 3,000 U.S.P. units for a child, 4,000 U.S.P. units for an adult. (Emphasis added)*

(2) For vitamin B<sup>1</sup> (thiamine), 0.25 milligram (83 U.S.P. units) for an infant. 0.5 milligram (167 U.S.P. units) for a child less than six years old, 0.75 milligram (250 U.S.P. units) for a child six or more years old, 1 milligram (333 U.S.P. units) for an adult.

(3) For vitamin C (ascorbic acid), 10 milligrams (200 U.S.P. units) for an infant, 20 milligrams (400 U.S.P. units) for a child less than six years old, 0.75 milligram adult.

App. 4

(4) *For vitamin D, 400 U.S.P. units for an infant, child, or adult. (Emphasis added)*

(5) For riboflavin, 0.6 milligram for an infant, 0.9 milligram for a child, 1.2 milligrams for an adult.

(6) For niacin or niacinamide 5.0 milligrams for a child less than 6 years old, 7.5 milligrams for a child 6 or more years old, 10 milligrams for an adult.

[20 F.R. 9646, Dec. 20, 1955, as amended at 22 F.R. 3841, June 1, 1957]

No. 74-1738

In the  
**United States Court of Appeals**  
For The Second Circuit

..... Term, A. D. 19.....

**The National Nutritional Foods Association,  
and Solgar Co., Inc.,**

**Plaintiff-Appellants,**

*vs.*

**Casper W. Weinberger, Secretary of Health  
and Welfare and Alexander M. Schmidt,  
Commissioner of Food and Drugs,**

**Defendants-Appellees.**

**PROOF OF SERVICE**

**Mary Black,**

being first duly sworn, deposes and says that he served three (3) copies of the  
**Brief of Amicus Curiae, National Health Federation**

in the above entitled cause by depositing same in the United States Mail properly stamped

and addressed to **Bass & Ullman  
747 Third Avenue  
New York, N. Y. 10017**

**Hon. Paul J. Curran  
U. S. Attorney for the  
Southern District of New York  
U. S. Court House - Foley Square  
New York, N. Y. 10007**

on the **5** day of **September, 1974**

at Chicago, Illinois.

Subscribed and sworn to before me this **5** day of **September, 1974**

My Commission expires **April 30, 1975**

*Mary Black*  
*P. J. Petronio*  
Notary Public